APPENDIX A

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
ORAL INITIAL DECISION AND ORDER

JOYCE CAPPS,
Administrative Law Judge:

This proceeding comes before the National Transportation and Safety Board pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, on the appeal of Cpt. Harvey Bonham Fox, Respondent herein, to the Order of Suspension dated September 24, 1990, suspending his Airman Certificate for a period of 30 days, which, however, is being waived at this point in view of a stipulation arrived at by counsel that a timely NASA report has been filed, due to his alleged violations of Sections 91.65(d), 91.75(b), and 91.9 of the Federal Aviation Regulations.

After due Notice to the parties, this matter came on for trial in Kansas City, Missouri on May 30 (by the way, I want to thank both counsel for moving this case up a day) 1991, at which time the Administrator was represented by John W. Escott, Esq., and Respondent was represented by Mary McGuire Voog, Esq.

There is very little in this case that has been disputed. In fact, I don't think any of the facts have been disputed. What is in dispute is the interpretation to be given to the facts as they pertain to this case. The Respondent is a high time pilot with 14,000 hours and long experience. He has been employed by TWA since 1966 first as an engineer, then in 1968 he became first officer, and he has been operating as a captain on the DC-9 since 1989.

On November 21, 1989 the Respondent was the pilot in command of a DC-9 model 32 aircraft that at the time was being utilized as TWA flight No. 559. It was the fourth leg of a flight that he had been on all day with first officer by the name of Phillip Moore. Phillip Moore's also the holder of an ATP. The flight was scheduled to leave at 7:30 P.M. and there was some concern on the part of Cpt. Fox about the weather that they were going to hit in the Austin area. This flight was scheduled from St. Louis, Missouri to Austin, Texas. It was due to this concern of the weather that Cpt. Fox asked his first officer to take control of the flight while he, the Respondent herein, manned the radar equipment as well as handling the radios. This aircraft was equipped with what has been referred to in the evidence as a single type radio as opposed to the dual type. It was explained in the testimony that the dual radio is a much more full-proof type system in that the pilots do not have to write down or commit to memory certain frequencies and other instructions that they receive.

After taking off from St. Louis, Missouri, the Respondent's aircraft received a clearance to an altitude of 230. They wanted that flight level at the time, but Cpt. Fox was really wanting to get a higher altitude because of certain verbal reports he had gotten from other TWA pilots when he was on the ground that had flown up from the Texas area. Everything went uneventfully in this situation until Kansas City Center put the aircraft on a frequency of 132.65. The Respondent, as the non-flying pilot, was responsible for dialing in that frequency, but before he could do it, he had written it down on his note pad correctly, 132.65, and had also acknowledged that frequency on the radio. His attention was diverted by the radar dials that he was working and he was also involved at the time with the altimeter because his co-pilot had indicated an altimeter change and so he dialed that in. It was after these two attentions were taken

care of that he erroneously dialed in the frequency of 132.6. Left off the last digit of 5.

I got the picture from Cpt. Fox's testimony of a busy cockpit, but not abnormally busy. Every cockpit is busy. That's why they require the cockpit crew that they do require on these aircraft. I didn't hear any sort of activity that would adequately explain and mitigate the captain's failure to dial in the correct frequency.

Had the correct frequency been dialed in in this case, the Respondent would not have heard the subsequent instruction to Northwest 229 to go up to 290 flight level, but, since he was on the wrong frequency, he heard that or rather, I should say, misheard that instruction to Northwest 229 and assumed the instruction as his own clearance and acknowledged that clearance with the words "up to 290, TWA 559." There was testimony of an FAA bulletin that it is the responsibility of a controller to listen to a pilot's read back. This is part of our "fail safe" procedure. If that controller had picked up on the fact that it was a TWA 559 aircraft that was acknowledging and accepting a Northwest 229 clearance, there would not have been this deviation because it would have been immediately brought to the attention of Cpt. Fox that that clearance was not for him, but it was not picked up on. I know it was not accepted or knowledged in the accepted manner of putting the identification of the aircraft first and then the rest of the language after that, but I don't think that is all that important. The important thing is it was acknowledged and the TWA 559 identification was clearly given. That should have been picked up by the controller. That is a very serious and important situation where one aircraft assumes the clearance that is meant for another aircraft. So in this case I find that, with respect to the 91.75(b) regulation that it took two to tango here. It took concerted errors to equal the deviation . . . to occur in

that the aircraft went up from its assigned 230 flight level toward the 290 flight level when it should not have.

I find that the Administrator has established 91.65(d) by a preponderance of the evidence. It was sheer out and out negligence on the part of Cpt. Fox not to set that frequency dial correctly and, in the long run, it did lead to all of these other things. So it made it very unfortunate in this case. An improper frequency setting always gives rise to potential danger so, therefore, the 91.9 has also been established. It is, therefore, ORDERED that the Respondent did act in violation of Sections 91.65(d) and 91.9 of the Federal Aviation regulations; provided, however, that no penalty shall actually be served in view of the timely filing of a NASA report.

Entered this 30th day of May, 1991 in Kansas City, Missouri.

/s/ JOYCE CAPPS

JOYCE CAPPS
Judge

Edited on 6/18/91

JUDGE CAPPS: There being nothing further before me, we stand adjourned.

I want to give you a handwritten copy of your client's appeal rights. Now we stand adjourned.

APPENDIX B

APPENDIX B

SERVED: March 31, 1994
NTSB Order No. EA-4076

Docket SE-11422
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,
Complainant,

v.

HARVEY BONHAM FOX,
Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on May 30, 1991, following an evidentiary hearing.[1] The law judge affirmed an order (complaint) of the Administrator finding that respondent had violated 14 C.F.R. 91.65(d) and 91.9.[2]

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[1] The initial decision, an excerpt from the hearing transcript, is attached.

[2] § 91.9 (now 91.13(a)) provided:
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The law judge affirmed these charges but dismissed the complaint to the extent it alleged that respondent had violated 14 C.F.R. 91.75(b).[3] (Respondent's use of his certificates was not affected by the Administrator's order or the law judge's decision, as any sanction was waived pursuant to the Aviation Safety Reporting Program.) We deny the appeal.

Respondent was the non-flying, pilot-in-command of Trans World Airlines' November 21, 1989 evening Flight 559 between St. Louis, MO and Austin, TX. The parties do not dispute the relevant facts.

Respondent assumed the radio and radar duties, having some concern for lightning in the area.[4] At 0212:51, ATC assigned him a new radio frequency (132.65) to use to contact Kansas City ARTC Center. He wrote that frequency down and acknowledged it.[5] Later, when respondent dialed in the 132.65 frequency, he omitted the "5," dialing 132.6 only.

According to respondent, on tuning in the incorrect frequency, he identified his aircraft (ostensibly at 0213:15, per Exhibit A-3). He was awaiting an acknowledgement from

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§ 91.65(d) (now 91.123(e)) read:
Unless otherwise authorized by ATC [air traffic control], no person operating an aircraft may operate that aircraft according to any clearance or instruction that has been issued to the pilot of another aircraft for radar air traffic control purposes.

[3] § 91.75(b) (now 91.123(b)) provided:
(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

[4] There apparently was only one set of headphones, and the communications were not broadcast in the cockpit.

[5] This aircraft had only a "single head" radio and, thus, could not dial in the next frequency and later switch the radio to it, as dual head radios permit.

ATC when he ostensibly heard a clearance directing an aircraft to climb and maintain 29,000 feet. (His earlier clearance had been to 23,000 feet. Exhibit A-2 at 0205:13.)[6]

Respondent interpreted the clearance ("Northwest 229 climb and maintain flight level two nine zero.") as one for his flight, TWA 559.[7] He responded: "Up to two nine zero TWA five five nine." Exhibit A-3 at 8, time 0213:27. At this point, he turned the radio over to the first officer.

The traffic controller manning the 132.6 frequency heard 559's clearance acknowledgement but was in the midst of talking with Northwest Flight 226 and did not catch respondent's call sign. The controller knew something was wrong (*see* Tr. at 10). Immediately following his assurance that the Northwest flight had received and understood its clearance (as it had not yet responded due to the erroneous call sign used), the controller attempted to contact respondent.

The 132.6 controller broadcast "OK other aircraft calling [unintelligible] Kansas City." He rebroadcast this message twice more, at 0214:14 and at 0214:38 ("[O]ther aircraft calling Kansas City say again"). TWA 559 did not respond. Respondent testified that, even if he had been on the radio and had heard that conversation (which he was not, having turned the radio over to the first officer), it would not have prompted any action on his part as he was convinced the earlier clearance was directed to TWA 559. Tr. at 79.

Some minutes later (beginning at 0216:32, some 4 minutes after 559 had been assigned the 132.65 frequency) the

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[6] Three transcripts are in the record. Exhibit A-2 is a complete, certified transcript prepared by the FAA. Exhibit A-4 is an excerpt of A-2. Exhibit A-3 contains respondent's version of conversations on the tape (Exhibit A-1), with interpretations and commentary.

[7] The controller mistakenly called the Northwest flight number 229 when issuing the clearance, and later mistakenly called it 225. It actually was Flight 226.

controller for the 132.65 frequency began his attempts to contact respondent's aircraft. He broadcast the aircraft's flight number twice seeking an acknowledgement, and on the land line apparently asked his fellow controllers for assistance. (It is not clear to whom he is speaking, but at 0219:10 he said "see if you still have a TWA five fifty nine there for me." At 0219:34, the controller on the 132.6 position called his supervisor. The controller of the 132.65 position, at 0221:38, also said on the land line: "this is twenty nine see if maybe a TWA five fifty nine came over with some of those other guys that wasn't suppose to [be] there I'm just trying to find him.")[8] Flight 559, receiving on 132.6, would not have heard any calls to it that were broadcast on 132.65.

At 0221:44, respondent (still on 132.6) radioed his position, "out of two eight zero for two nine zero." He testified at the hearing that this communication signified his intent to obtain a clearance to a higher altitude. Tr. at 77 ("it's kind of a gentle nudge. I'm trying to say I want higher."). ATC queried his position, determined it was acceptable, and told him he was on the wrong frequency and had assumed a clearance directed to another aircraft.

The law judge dismissed the § 91.75(b) allegation, finding that ATC contributed to the deviation when the controller manning the 132.6 frequency failed to catch respondent's call mistakenly assuming Northwest 226's clearance. Initial decision at 4 ("It took concerted errors to equal the deviation that did finally occur. . . ."). She, however, affirmed the claimed § 91.65(d) and 91.9 violations, stating:

> It was sheer out and out negligence on the part of Cpt. Fox not to set that frequency dial correctly and, in the long run, it did lead to all of these other things.

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[8]The controllers manning the 132.6 and the 132.65 frequencies are across the room from each other. Tr. at 8.

Initial decision at 5.

On appeal, respondent argues that these findings are internally inconsistent in that, if ATC was equally culpable in connection with the clearance deviation supporting the § 91.75 charge thus exonerating respondent, then he must be exonerated for the same reason on the "taking the clearance of another" charge. While respondent's argument may have some merit, we need not answer the question as we find ample support in the record and precedent for affirmance of the § 91.65(d) and 91.9 charges.[9]

We have held that we will not affirm the Administrator's order when ATC is the initiating or principal cause of the violation of the regulations. *See, e.g., Administrator v. Snead*, 2 NTSB 262 (1973); *Administrator v. Nelson and Keegan*, 2 NTSB 1900 (1975); and *Administrator v. Clary*, 3 NTSB 2380 (1980). These principles were most recently discussed in *Administrator v. Frohmuth and Dworak*, NTSB Order EA-3816 (1993), where we clarified that, even if a deviation from a clearance is caused by a mistake on the pilot's part, that mistake will be excused and no violation will be found if, after the mistake, the pilot takes actions that, but for ATC, would have exposed the error and allowed for it to be corrected.

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[9]We disagree with the law judge's conclusion that § 91.75 was not violated. Although the Administrator did not appeal the law judge's dismissal of the § 91.75 charge, and we therefore do not formally address the issue, we remain able to affirm the § 91.65 charge using a theory that would require (or permit) affirmation of the § 91.75 charge as well.

In her decision, the law judge was applying only one limited aspect of our precedent in her finding that ATC contributed to the deviation.[10] We cannot find here either that ATC was the initiating or principal cause of the incident or that respondent took all reasonable steps after his mistake and that it was ATC's fault that the mistake was not quickly exposed and resolved.

Respondent's first error was in his mis-entering of the frequency. After doing so, he did not take those reasonable actions that would have uncovered the mistake. Although the Administrator's transcript contains no reference to a squelch, listening to the tower tape itself confirms respondent's contention that he identified his aircraft to ATC at approximately 2:15:15. *See* Exhibits A-3 and A-2. Respondent, however, did not await an acknowledgment by that controller of his signing on the new frequency. He should have done so prior to his accepting any clearance. In that way, there would have been no doubt that two-way radio communications had been established. If the controller manning the 132.6 frequency had spoken directly to respondent's aircraft, the subsequent misappropriation of a clearance would have been far less likely to occur because the controller, immediately knowing to whom he was speaking, could immediately have corrected respondent's error.

Moreover, respondent's second mistake — accepting a clearance not directed to him — was not initiated by ATC, nor was ATC its principal cause. The controller for frequency 132.6 did not expect respondent on his channel, yet he reacted promptly when he realized there was a problem. And, the controller for frequency 132.65 did not wait an inordinately long time before he tried to raise respondent that he would excuse respondent's conduct, were such delay a factor in our analysis. The unrebutted evidence indicates

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[10]She found: "it took two to tango." Initial decision at 4.

that TWA 559 would have heard the conversation between Northwest 226 and ATC, confirming 226's clearance to 29,000 feet. TWA 559 did not call to clarify to whom the clearance was directed, nor did the aircraft respond to ATC's repeated request for aircraft that had called Kansas City to respond.[11]

Respondent also challenges the § 91.65(d) finding on the grounds that, allegedly, it applies only to willful acts. Respondent, however, offers no support for this proposition in the language of the subsection, in case law, or in a review of the rule's development. As the Administrator points out in reply, case law does not require proof of a willful act. *See Nelson and Keegan*, 2 NTSB 1900 (1975).[12]

Respondent also suggests that a finding against respondent here is inconsistent with the FAA's own interpretation and application of § 91.65(d). While this could be an important issue if true, the fact that the Administrator exercises prosecutorial discretion is not, we think, equated to a finding of inconsistent interpretation, especially when the facts of the cases are not the same. Thus, whether the law judge was correct in excluding material regarding the Administrator's determination not to prosecute another pilot, is at most harmless error.[13]

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[11] While it is not dispositive, we also note that respondent's allegedly routine query (at 0221:44) intended to suggest a higher clearance, is phrased in language much in the nature of what would be said in an initial sign on to a new frequency announcing his position and call sign.

[12] Respondent further suggests, but does not elaborate, that the rule applies only to formation flight. As with the above claim, in the absence of convincing support for this proposition, we must reject it.

[13] The Administrator asks that this rejected material, which respondent includes in his brief, be stricken from the record. We can see no real harm in respondent's presenting the documents rather than describing them. We deny the motion.

Finally, respondent argues that the § 91.9 finding was incorrect as a matter of law and fact. Respondent argues that the dialing in of the wrong frequency cannot be careless, in law or fact. Not only does this claim ignore respondent's later inaction, as detailed above, and the law judge's finding (initial decision at 3) that respondent was not unusually busy,[14] it ignores precedent, as set forth, for example, in *Administrator v. Haney*, NTSB Order EA-3832 (1993) and *Administrator v. Pritchett*, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation). Respondent's additional argument that his action cannot be careless because there was no danger in the incident also conflicts with precedent. *Roach v. National Transp. Safety Bd.*, 804 F.2d 1147, 1157 (10th Cir. 1986), *cert. den'd*, 486 U.S. 1006 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is denied; and
2. Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.

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[14] Respondent also testified that things in the cockpit were normal. Tr. at 85.

APPENDIX C

APPENDIX C

No. 94-1638

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1995

United States Court of Appeals
For the District of Columbia Circuit

Filed December 26, 1995

HARVEY BONHAM FOX,
Petitioner

v.

DAVID R. HINSON, Administrator,
Federal Aviation Administration;
National Transportation Safety Board,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

BEFORE: Silberman, Sentelle, and Randolph, Circuit Judges

JUDGMENT

This petition for review and the motion of the Administrator of the Federal Aviation Administration to strike, and the response thereto, were considered on the record from the National Transportation Safety Board ("NTSB") and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED that the portion to strike be granted. Because the document entitled "Offer of Proof" was not submitted to

the NTSB, it may not properly be made a part of the record on appeal. It is

FURTHER ORDERED AND ADJUDGED that the petition for review from the NTSB's order served March 31, 1994, be denied for the reasons stated in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 94-1638 — *Harvey Bonham Fox v. David R. Hinson, Administrator, Federal Aviation Administration*

MEMORANDUM

The NTSB's decision that petitioner violated sections 91.9 and 91.65(d) of the Federal Aviation Regulations ("FAR") is supported by substantial evidence. *See, e.g., Throckmorton v. Nat'l Transp. Safety Bd.*, 963 F.2d 441 (D.C. Cir. 1992). Petitioner violated the above FAR regulations by first improperly setting his radio to the wrong frequency, failing to establish two-way communication to ensure that he was connected to the controller monitoring his air space, and mishearing and accepting a clearance issued to another flight which did not have a similar call sign. Air traffic control was not the initiating, or principal, cause of petitioner's deviation from his assigned altitude. *See, e.g., Administrator v. Frohmuth and Dworak*, NTSB Order EA-3816, 1993 WL 75479 (1993); *Administrator v.*

Nelson and Keegan, 2 NTSB 1900 (1975); *Administrator v. Snead*, 2 NTSB 262 (1973).

Moreover, the NTSB properly determined that the incident involving the other TWA flight, evidence of which petitioner unsuccessfully sought to introduce at trial, is factually distinguishable from the instant case; therefore, its exclusion was harmless error. Finally, the Administrative Law Judge's determination that the testimony of the FAA's expert was more credible than that of petitioner's expert is entitled to great deference. *See Chen v. General Accounting Office*, 821 F.2d 732, 738 (D.C. Cir. 1987).

APPENDIX D

APPENDIX D

14 C.F.R. PART 91.9

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.